No. 92-1639

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

THE CITY OF CHICAGO, *et al.*,
Petitioners,
v.
ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i), which provides that a "resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes," exempts from hazardous waste regulation the ash generated by burning municipal solid waste at such a facility.

PARTIES TO THE PROCEEDING

The petitioners are the City of Chicago and Richard M. Daley, in his official capacity as Mayor of the City of Chicago. The respondents are the Environmental Defense Fund, Inc., and Citizens for a Better Environment.

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Petitioners, the City of Chicago and Mayor Richard M. Daley, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court, App., *infra*, 1a-4a, is reported at 985 F.2d 303 (7th Cir. 1993). The original opinion of the court of appeals, App., *infra*, 5a-21a, is reported at 948 F.2d 345 (7th Cir. 1991), vacated and remanded, 113 S. Ct. 486 (1992). The district court's memorandum opinion and order of November 29, 1989, App., *infra*, at 22a-33a, is reported at 727 F. Supp. 419 (N.D. Ill. 1989).

JURISDICTION

The judgment of the court of appeals upon remand from this Court was originally entered by an unpublished order issued on January 12, 1993. The court of appeals issued a published decision on January 29, 1993. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 6921(i)

(1) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—

(1) such facility—

(A) receives and burns only—

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

STATEMENT

1. *Background.* As this case comes to the Court for the second time, the country remains in the midst of a waste disposal crisis. We generated approximately 180 million tons of municipal solid waste—the "residential and commercial solid wastes generated within a community" (40 C.F.R. § 241.101(k))—in 1988; that number is projected to grow to 216 million tons by the year 2000. See 56 Fed. Reg. 50978, 50980 (1991) (summarizing the findings of Environmental Protection Agency study). Much of that waste is now deposited in landfills, but we are running out of landfill capacity.

More than fifteen years ago, Congress warned that "alternatives to existing methods of land disposal must be developed since many of the cities of the United States" are running out of waste disposal sites. 42 U.S.C. § 6901(b)(8). More recently, Congress has determined that "the recovery of energy and materials from municipal waste, and the conservation of energy and materials contributing to such waste streams, can have the effect of reducing the volume of the municipal waste stream and the burden of disposing of increasing volumes of solid waste." *Id.* § 6941a(3). See also *id.* § 6941a(2) ("solid waste contains valuable energy and material resources which can be recovered and used thereby conserving increasingly scarce and expensive fossil fuels and virgin materials").

Facilities that extract reusable materials from municipal solid waste or convert solid waste into energy are classified as "resource recovery" facilities under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6903(24). As of November 1991, there were 137 resource recovery facilities in operation in the United States, eleven facilities under construction, and an estimated additional 57 facilities in the planning phase. See Kiser, *Municipal Waste Combustion in the United States:*

An Overview, Waste Age (Nov. 1991), at 27, 109.[1] These facilities generate power that is equivalent to the amount of energy needed to supply electricity to 1.2 million homes, or the amount produced by 30 million barrels of oil. *Id.* at 27.

The general federal statutes and regulations governing waste disposal are an important part of the regulatory matrix applicable to the operation of resource recovery facilities. When Congress enacted RCRA, it directed that "hazardous waste" be managed pursuant to a separate regulatory scheme—set forth in Subtitle C of the statute—that establishes standards for the treatment, storage, and disposal of such waste. See 42 U.S.C. §§ 6921-6939.[2] Generators of hazardous waste must obtain an identification number from the United States Environmental Protection Agency (EPA) before engaging in the treatment, storage, transportation, or disposal of hazardous wastes. See 40 C.F.R. § 262.12 (1991). Hazardous waste must be packaged, labelled, and marked according to specific regulations before it may be shipped. See *id.* § 262.30-33. It may be held only in approved containers and only for specified periods of time. See *id.* § 262.34. Facilities that treat, store, or dispose of hazardous waste must obtain permits (see 42 U.S.C. § 6925), and must comply with many regulations setting performance standards for

[1] A more recent survey found that in 1993 there were 128 operating resource recovery facilities, four facilities under construction, and an estimated 42 facilities in planning. Solid Waste & Power, *Energy-from-Waste 1993 Activity Report* i (1993).

[2] The statute defines "hazardous waste" as "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infection characteristics may—

> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness; or
>
> (B) pose a substantial present or potential hazard to human health when improperly treated, stored, transported, or disposed of, or otherwise managed."

42 U.S.C. § 6903(5).

such facilities. See *id.* § 6924; 40 C.F.R. § 264.1-264.1065.

Disposal of non-hazardous waste is regulated under Subtitle D of RCRA, which provides significantly less stringent regulation than Subtitle C. See 42 U.S.C. §§ 6941-6949. The EPA has promulgated regulations setting minimum national standards for these landfills. See 56 Fed. Reg. 50978 (1991).

Waste from homes and offices frequently contains some components that qualify as hazardous waste under the federal scheme, but Congress made clear in the legislative history of RCRA that it did not intend to regulate such "general municipal wastes" as hazardous waste. S. Rep. No. 988, 94th Cong., 2d Sess. 16 (1976). The EPA subsequently promulgated a regulation—the "household waste exclusion"—providing that "any material * * * derived from households (including single and multiple residences, hotels and motels * * *)" is not a hazardous waste within the meaning of the statute. 40 C.F.R. § 261.4(b)(1). This exclusion permits the disposal of all household waste in a Subtitle D landfill, even if the waste would qualify as hazardous waste under the generally applicable statutory standard. At the time the EPA issued this regulation, it stated that the exclusion extended to ash remaining after household waste was burned in an incinerator. "Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. 33098 (1980).

In 1984, Congress added a new provision to RCRA—Section 3001(i)—entitled "Clarification of household waste exclusion." It states in pertinent part that "[a] resource recovery facility recovering energy from the mass burning of municipal waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous waste for the purpose of regulation under this

subchapter" if the facility receives and burns only (a) household waste and (b) commercial and industrial solid waste that does not contain hazardous waste. 42 U.S.C. § 6921(i).[3]

The Senate committee report accompanying this provision observed that resource recovery facilities often take in household waste mixed with non-hazardous waste from sources other than households, such as schools, churches, and municipal buildings. The committee stated that "[i]t is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation. New section [3001(i)] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources." S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983).

The question in this case is whether, pursuant to Section 3001(i), the ash residue remaining after solid waste is burned in a resource recovery facility may be disposed of in a Subtitle D disposal facility, regardless of whether the ash might qualify as a hazardous waste under the generally applicable standard.

2. *The Chicago Resource Recovery Facility.* The City of Chicago owns and operates a resource recovery facility, the Northwest Waste-to-Energy Facility ("Northwest Facility"), where it burns municipal solid waste and generates electricity, thereby reducing the volume of waste disposed of in landfills and helping to reduce dependence on imported oil for the generation of electricity. The facility processes approximately 14% of the municipal solid waste produced in Chicago. R. 18. It also produces steam by recovering the energy generated from the combustion of the waste. The facility not only uses the steam for its own operations, but also sells it for $1 million to nearby industry and for another $500,000 to the local utility. *Ibid.* Finally, the facility recovers approximately 55 tons of tin cans and other ferrous metals each day, which are sold to scrap metal dealers. *Ibid.*

[3] In addition, the facility may not accept hazardous waste, and the owner or operator of the facility must "establish[] contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility." 42 U.S.C. § 6921(i)(2).

At the time that this case was before the district court, the City disposed of the ash remaining at a sanitary landfill located in Three Oaks, Michigan, that received only municipal incinerator ash. R. 18. This is a lined landfill with a leachate collection system and groundwater monitoring systems to monitor its performance. *Ibid.* The City does not test the ash produced at the Northwest Facility to determine whether it would be classified as hazardous under EPA regulations, and has not managed the ash as a hazardous waste.

3. *The Proceedings Below.* The Environmental Defense Fund and Citizens for a Better Environment (hereinafter collectively referred to as EDF) filed the complaint in this case, alleging that the City violated several provisions of RCRA, 42 U.S.C. §§ 6901-6992(k), by not handling the ash produced at the Northwest Facility as a hazardous waste pursuant to Subtitle C of RCRA. R. 1. The district court had jurisdiction over this federal question pursuant to 28 U.S.C. § 1331. EDF simultaneously filed a similar action in the Southern District of New York against Wheelabrator Technologies, Inc. and Westchester Resco Co., which own and operate a resource recovery facility in Peekskill, New York. See *Environmental Defense Fund v. Wheelabrator Technologies*, 725 F. Supp. 758 (S.D.N.Y. 1989), aff'd, 931 F.2d 211 (2d Cir.), cert. denied, 112 S. Ct. 453 (1991).

In this case, the parties filed cross motions for summary judgment. R. 18, 30. The City's position was that Section 3001(i) exempted the process of incincerating

waste and producing ash at a resource recovery facility from regulation as hazardous waste. In addition to filing its own motion for summary judgment, EDF opposed the City's motion on the ground that the City had not yet demonstrated that the City's facility met the requirements of Section 3001(i).

The district court issued a memorandum opinion and order holding that Section 3001(i) of RCRA exempted the ash produced at resource recovery facilities from regulation as a hazardous waste. App., *infra*, at 22a. The court held that when Congress amended RCRA to exempt resource recovery facilities from hazardous waste regulations, it intended to exclude all waste management activities at these facilities from regulation. *Id.* at 28a. The district court found that this conclusion was consistent with RCRA's policy goal of encouraging resource recovery facilities and removing impediments that may hinder their development and operation. *Ibid.* The district court, however, denied both motions for summary judgment, and allowed EDF additional discovery to determine whether the Chicago facility followed the procedures required under Section 3001(i) for excluding the intake of hazardous wastes. *Id.* at 33a. EDF later stipulated that it would not contest the adequacy of the Northwest Facility's procedures for excluding hazardous wastes and would not oppose a renewed motion for summary judgment by the City. R. 91. The district court subsequently granted the City's renewed motion for summary judgment. App., *infra*, at 34a.

A divided court of appeals reversed in an opinion issued on November 19, 1991. The majority held that the ash generated by a municipal solid waste incinerator must be disposed of in accordance with the provisions of Subtitle C of RCRA. App., *infra*, at 18a, 20a. The majority focused on the Section 3001(i) exception from hazardous waste regulations when a resource recovery facility is "treating, storing, disposing of, or otherwise managing" waste, noting that that section does not ex-

plicitly exempt the ash "generated" by such facilities. App., *infra*, at 18a-19a. The majority acknowledged that the only other appellate court to address this issue, the Second Circuit in the *Wheelabrator* case, had reached the opposite conclusion. *Id.* at 8a. In that case, the Second Circuit concluded that Section 3001(i) of RCRA exempted the ash remaining after incineration of municipal solid waste at a resource recovery facility from regulation as a hazardous waste. See *Environmental Defense Fund v. Wheelabrator Technologies*, 931 F.2d at 213.

Judge Ripple dissented, stating that he would affirm for the reasons stated in the Second Circuit and Southern District of New York opinions. App., *infra*, at 21a.

The City filed a petition for a writ of certiorari on February 18, 1992. EDF acknowledged the square conflict with the decision in *Wheelabrator* and agreed that the case presented an important question of federal law. Brief for Respondent, No. 91-1328, at 8 (on petition). EDF urged the court to grant certiorari. *Id.* at 8, 12, 17. By order of May 18, 1992, the Court invited the views of the Solicitor General.

On September 18, 1992, the Administrator of the EPA issued a memorandum setting forth EPA's decision that under Section 3001(i) of RCRA, the ash generated from the combustion of municipal solid waste at resource recovery facilities should be treated as exempt from hazardous waste regulation under Subtitle C of RCRA. App., *infra*, at 41a. Shortly thereafter, the Solicitor General responded to the court's invitation by suggesting that the petition be granted, the decision vacated, and the case remanded to the Seventh Circuit for further consideration in light of the EPA memorandum. Brief for the United States as Amicus Curiae, No. 91-1328, at 7, 13, 18 (on petition). On November 16, 1992, this Court entered the suggested order. *City of Chicago v. Environmental Defense Fund*, 113 S. Ct. 486 (1992) (granting, vacating, and remanding).

On remand, the same divided court of appeals panel reaffirmed its previous decision. The majority held that the EPA memorandum did not affect its opinion or judgment in this case. App., *infra*, at 2a. Judge Ripple again dissented, stating that the EPA's action deserved deferential review and that, accordingly, he would affirm the judgment of the district court. App., *infra*, at 3a-4a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's second decision in this case still squarely conflicts with the decision of the Second Circuit on an important issue of federal environmental law affecting resource recovery facilities throughout the country that burn municipal solid waste to produce energy. Although this Court afforded the Seventh Circuit the opportunity itself to resolve the conflict, that court has declined the invitation to do so. As a result, the conflict that we noted in our prior petition—and that the court below, EDF, and the Solicitor General acknowledged—remains. Resource recovery facilities located in the Second Circuit may manage the ash left after they burn municipal solid waste as a non-harzardous waste pursuant to Subtitle D of RCRA, but, as a result of the decision below, all resource recovery facilities in the Seventh Circuit must manage the ash as a hazardous waste pursuant to Subtitle C. These conflicting decisions destroy the uniformity necessary to the effectiveness of environmental policy.

The conflict between the circuits also produces substantial hardship and unfairness. Subtitle C disposal is considerably more onerous, and therefore, much more expensive, than disposal under Subtitle D.[4] That addi-

[4] In the September 1992 memorandum, EPA noted that the cost of Subtitle C disposal is ten times the cost of Subtitle D disposal. The memorandum states that "[a]lthough costs vary significantly from region to region, when averaged on a national basis there is over a ten-fold difference between the cost of disposal of MWC [municipal waste combustion] ash in a Subtitle C facility compared to a Subtitle D landfill: the cost of transporting and disposing of MWC ash in a Subtitle C facility is approximately $453.00 per ton; the cost of doing so in a Subtitle D landfill is approximately $42.00 per ton. For states that combust substantial portions of their solid waste (in resource recovery and other combustion facilities), such as Connecticut (65%), Massachusetts (47%), and Maine (45%), this cost differential could be enormous." App., *infra*, at 48a-49a. Based on these average figures, the increased costs for the City's Northwest Facility, which must dispose of between 110,000 and 140,000 tons of ash annually (App., *infra*, at 6a), could amount to more than $57 million each year.

tional cost has been imposed on resource recovery facilities within the Seventh Circuit, but not on facilities in the Second Circuit.

Moreover, resource recovery facilities in other circuits continue to face great uncertainty in determining how to manage their ash. Their choice is to treat the ash as a hazardous waste or ship it to a circuit where it has not been held to be a hazardous waste, either way incurring large and perhaps wholly unnecessary expenses that would substantially alter the economics of running such a facility. Or they may treat the ash as a non-hazardous waste and risk the heavy penalties that may be imposed in the event that other courts subsequently hold that the ash is a hazardous waste that should have been managed in accordance with Subtitle C. Transporters of ash and operators of waste disposal facilities that receive ash face similar uncertainty: they are all subject to huge monetary penalties if they fail to comply with Subtitle C requirements and those provisions are later held applicable to ash. Indeed, this state of affairs creates the anomalous possibility that municipal waste in one circuit might now be transported to another circuit for incineration. The petition for a writ of certiorari should be granted to resolve this conflict, eliminate the by now long-standing uncertainty, and alleviate the unwarranted burden on resource recovery facilities in the Seventh Circuit.

1. The Second and Seventh Circuits' interpretations of Section 3001(i) of RCRA remain diametrically opposed. Section 3001(i) provides, in pertinent part, that:

> A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purpose of regulation under [Subtitle C] * * *.

42 U.S.C. § 6921(i). The Seventh Circuit's majority held that because this section did not specifically provide an exemption for generating hazardous waste, the ash produced by resource recovery facilities burning municipal solid waste must be managed as hazardous waste, notwithstanding the specific exemptions for "treating, storing, disposing of, or otherwise managing hazardous wastes." The Second Circuit, by contrast, interpreting Section 3001(i) in the *Wheelabrator* case, held that this section did exempt from hazardous waste regulation the ash generated by the burning of municipal solid waste, notwithstanding the absence of a specific exemption in the statute for generating hazardous waste. *Environmental Defense Fund v. Wheelabrator Technologies*, 725 F. Supp. 758, 765, 770 (S.D.N.Y. 1989), aff'd, 931 F.2d 211 (2d Cir.), cert. denied, 112 S. Ct. 453 (1991).[5]

As a result of the conflict in the circuits, resource recovery facilities are uncertain how to plan and carry out their operations. Local governments that operate or contract with resource recovery facilities as well as disposal site operators, are subject to substantial penalties under RCRA—up to $25,000 per day—for mishandling hazardous waste. See 42 U.S.C. § 6928(g). And, as this case demonstrates, actions seeking penalties may be brought by private parties (42 U.S.C. § 6972(a)), not just by the EPA. Accordingly, all resource recovery facilities outside of the Second and Seventh Circuits and the numerous waste disposal facilities in those 44 states must now choose among incurring the very significant costs of treating the ash as a hazardous waste (see note 4, *supra*),

[5] When this Court denied the petition in the *Wheelabrator* case, there was no conflict between the circuits because the Seventh Circuit had not yet issued its opinion in the present case.

facing harsh RCRA penalties if they guess wrongly about how the ash should be treated in their circuit, or shipping waste to the Second Circuit for incineration. Such a situation is intolerable. Efficient operations under a statute as complex and specific as RCRA are severely compromised by this uncertainty.

The practical problems this lack of uniformity can cause are well illustrated in this case. The City's Northwest Facility is located in the City of Chicago, in the Seventh Circuit. The ash produced at that facility was disposed of at a landfill located in Michigan, in the Sixth Circuit. Although the ash is regulated as a hazardous waste within the Seventh Circuit, the Sixth Circuit Court of Appeals has not addressed the issue. But the landfill that used to accept the ash from the Northwest Facility is as effectively regulated as if there were law in that circuit. The City of Chicago cannot, under the Seventh Circuit's ruling, do business with the landfill in Michigan, unless it moves its incinerator to the Sixth Circuit, or contracts with an incinerator operator there. The situation facing local governments in the First and Third Circuits is even more precarious. Under the *Wheelabrator* case, a resource recovery facility in the Second Circuit can continue to dispose of ash under Subtitle D of RCRA. But a disposal site in an adjacent circuit, where the court of appeals has not spoken, might well refuse to accept municipal ash because of the fear of RCRA penalties, should the First and Third Circuits ultimately side with the Seventh in requiring such ash to be managed as hazardous waste under Subtitle C. Yet, waste from the First and Third Circuits could still be shipped to the Second for incineration, although it is far from clear which circuit's law would apply in an action seeking to impose fines on a local government sending its waste to another circuit.

Federal regulation of the ash, whether under Subtitle D or Subtitle C of RCRA, should be uniform throughout the country. This Court should resolve this conflict so that

federal regulation of the ash does not depend upon the location of the resource recovery facility and so that resource recovery facilities and disposal sites can plan and carry out their operations with certainty.

2. The decision of the Seventh Circuit majority is also wrong. It is at odds with the plain language of the statute, its purpose, and intent. The language of Section 3001(i) is broad. It exempts the activities of a resource recovery facility from all hazardous waste regulation—those governing "treating, storing, disposing of or otherwise managing" waste. The statutory definition of hazardous waste "management" includes all "storage, transportation, processing, treatment, recovery and disposal of hazardous wastes." 42 U.S.C. § 6903(7). "Treatment" is defined, in part, as "any method, technique, or process * * * designed * * * so as to render such waste * * * reduced in volume." 42 U.S.C. § 6903(34). These terms plainly encompass producing and then handling and disposing of ash. Thus, by holding that Subtitle C regulations apply to the production and handling of ash, the Seventh Circuit has violated the plain terms of Section 3001(i), which indicates that facilities like the Northwest Facility need not comply with the requirements of Subtitle C because they do not treat or "manag[e] hazardous wastes."

The legislative history of Section 3001(i) also indicates its broad scope. It clarifies that the ash produced at a resource recovery facility is exempt from regulation. The Report of the Senate Committee on Environment and Public Works, which accompanied the proposed legislation and commented on Section 3001(i), clearly stated that "[a]ll waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion * * *." S. Rep. No. 284, 98th Cong., 2d Sess. 61 (1983). In addition, Section 3001(i) is a clarification of the EPA's Household Waste Exclusion, "a previously existing regulatory exclusion which clearly extended to ash." *Wheelabrator*, 725 F. Supp. at 765.

Because the EPA's Household Waste Exclusion extends to the ash produced when household waste is burned, the result of the Seventh Circuit's construction of the statute is that ash produced by incinerators burning only household waste is exempt from Subtitle C regulation, but ash produced by resource recovery facilities is not. See *Wheelabrator*, 725 F. Supp. at 765. Thus, the court below has transformed a statute designed to provide an incentive for resource recovery by relieving regulatory burdens on resource recovery facilities into one that subjects those facilities to greater regulation and increased costs. That is precisely the opposite of what Congress sought to achieve.

Indeed, if Section 3001(i) subjects the ash remaining from the burning of municipal waste to Subtitle C regulation, Section 3001(i) provides little if any regulatory relief for resource recovery facilities because it fails to exempt these facilities from one of the most onerous regulatory burdens. See *Wheelabrator*, 725 F. Supp. at 763 n.12 (if ash is not exempt from regulation as a hazardous waste "it is difficult to understand what, if any, benefit [resource recovery facilities] deriv[e] from the exemption"). This misinterpretation of Section 3001(i) should be corrected by this Court.

Even if Section 3001(i) were ambiguous, the Seventh Circuit erred. On remand from this Court, the Seventh Circuit should have deferred to the reasonable interpretation of Section 3001(i) reached by the EPA, the agency charged with the administration of RCRA. See, *e.g.*, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984).

3. Important policy considerations favor the resolution of the question presented in this case. Disposal of garbage is one of the major problems local governments are facing today. Congress has recognized that the United States is confronted with a solid waste disposal crisis, due to an ever increasing volume of solid waste and a rapidly diminishing amount of landfill space (see 42 U.S.C.

§ 6901(a) and (b)), and that reliance on landfills as the primary method for solid waste disposal needlessly pollutes valuable land and results in the burial of millions of tons of recoverable materials and energy sources (see *id.* § 6901(b)(1), (c) and (d)). Congress has found that the recovery of solid waste materials "can reduce the dependence of the United States on foreign resources and reduce the deficit in the balance of payments" (*id.* § 6901(c)(3)), and that solid wastes represent a potential source of energy that can reduce the nation's dependence upon sources of energy such as petroleum products, natural gas, and nuclear or hydroelectric generation of energy (*id.* § 6901(d)). When Congress amended Subtitle D of RCRA in 1980, it found that:

> (2) solid waste contains valuable energy and material resources which can be recovered and used thereby conserving increasingly scarce and expensive fossil fuels and virgin materials;
>
> (3) the recovery of energy and materials from municipal waste, and the conservation of energy and materials contributing to such waste streams, can have the effect of reducing the volume of the municipal waste stream and the burden of disposing of increasing volumes of solid waste.

Id. § 6941(a)(2) and (3). Resource recovery facilities further these congressional goals.

The conclusion of the majority below that Congress would not have approved the disposal of hazardous ash in ordinary landfills, App., *infra*, at 20a, ignored these important reasons Congress had for encouraging the development and use of resource recovery facilities. Congress has made it clear that it intends to encourage resource recovery facilities. See 42 U.S.C. §§ 6902(1), (10) and (11), 6948(d)(3). Indeed, the Senate Report accompanying Section 3001(i) states that "[i]t is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation." S. Rep. No. 284 at 61. The congressional choice reflected in Section 3001(i) to exclude the waste management activities of resource recovery facilities from hazardous waste management regulations was intended to encourage resource recovery as one of the solutions to this country's mounting solid waste disposal crisis.

The present confusion regarding the scope of the Section 3001(i) exemption will have a significant deterrent effect on development of additional resource recovery facilities. The cost of disposing of ash is an important element of the economics of operating these facilities. See note 4, *supra*. Municipalities considering such a project cannot now determine whether resource recovery will be justified economically because they cannot make any reliable projection of disposal costs. A municipality would be unlikely to embark on such an expensive undertaking when it has no way to predict the eventual costs and, therefore, whether the anticipated revenues would cover those costs. Thus, the uncertainty spawned by the conflicting appellate decisions is at the present time thwarting Congress's clear purpose of encouraging use of this technology.

4. Finally, both the Second Circuit and the Seventh Circuit concluded that Congress has left the question of the meaning of Section 3001(i) for judicial resolution. See *Wheelabrator*, 931 F.2d at 213; App., *infra*, at 9a. This conclusion was based upon Section 306 of the Clean Air Act Amendments of 1990, which provides that:

> For a period of 2 years after the date of the enactment of the Clean Air Act Amendments of 1990, ash from solid waste incineration units burning municipal waste shall not be regulated by the Administrator of the Environmental Protection Agency pursuant to section 3001 of the Solid Waste Disposal Act. Such reference and limitation shall not be construed to affect any activity by the administrator following the 2-year period from the date of enactment of the Clean Air Act Amendments of 1990.

Clean Air Amendments, Pub. L. No. 101-549, § 306, 104 Stat. 2399, 2584 (1990). The Conference Report accompanying this section specifically stated that "[t]he conferees do not intend to prejudice or affect in any manner ongoing litigation, including *Environmental Defense Fund v. Wheelabrator, Inc.*, 725 F. Supp. 758 (2d Cir. [sic] and *Environmental Defense Fund v. City of Chicago*, Appeal No. 90-3060 (7th Cir.), or any state activity regarding ash." H. Rep. No. 952, 101st Cong., 2d Sess. 335, 342 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News 3867, 3874. Both courts of appeals interpreted this section of the Clean Air Act Amendments to mean that Congress intended to preclude the EPA from promulgating any new regulations, but to allow the EPA to enforce the regulatory scheme already in place. See *Wheelabrator*, 931 F.2d at 213; App., *infra*, at 9a. Both courts concluded that Congress was waiting for the courts to resolve the issue raised in these cases.[6] The two courts, however, reached opposite conclusions about the meaning of Section 3001(i), and despite this Court's remand of this case to the Seventh Circuit for further consideration in light of the EPA memorandum of September 1992, the courts remain in conflict. Because the courts of appeals are in disagreement, it is up to this Court to provide Congress with a judicial resolution of that question.[7]

[6] The Seventh Circuit stated that "it may well have been that Congress wanted to see what the courts had to say before undertaking any retooling of the current regulatory scheme." App., *infra*, at 9a. Similarly, the Second Circuit stated that "Congress simply may have desired to maintain the status quo pending judicial resolution of the issues presented here and in *City of Chicago*. Once the courts have spoken, Congress will be in a better position to evaluate its options regarding the treatment of incinerator ash and to direct its future legislative efforts accordingly." *Wheelabrator*, 931 F.2d at 213.

[7] There is no indication that Congress is likely to resolve the issue raised in this case at any time in the near future. No bill has yet been introduced in this Congress. Even if RCRA were reauthorized, the new statute may not deal with this issue. Moreover, a new statute might be prospective only, leaving all municipalities with resource recovery facilities outside of the Second Circuit with potential liability for substantial penalties in civil penalty actions, like this one, that can be commenced by private parties (see 42 U.S.C. § 6972(a)), if the issue how the ash is to be regulated is not resolved by this Court. Resource recovery facilities should not be left in a state of uncertainty based on speculation that Congress might act to address this issue some time in the future.

Moreover, although that EPA memorandum represents EPA's definitive position on this issue, it failed to resolve the conflict in the interpretation of Section 3001(i) because the Seventh Circuit has rejected the EPA's interpretation. In its opinion on remand, the majority concluded that "[t]he agency's change of position and Administrator Reilly's memorandum explaining it do not persuade us that our analysis of RCRA was in error." App., *infra*, at 2a.

In sum, there is a conflict between the circuits on an important issue of environmental law: the management of ash produced at resource recovery facilities. A federal statute that depends for its effectiveness on uniform application throughout the country has been interpreted to exempt the ash from hazardous waste regulation in the Second Circuit, but to require the management of the ash as a hazardous waste in the Seventh Circuit, with the result that resource recovery facilities in all other circuits are uncertain how to manage their ash. Moreover, Congress has indicated that it is waiting for judicial resolution of this issue, and indeed there is no resolution likely from any other quarter. The courts of appeals and the EPA have been unable to resolve this issue. This Court should, therefore, resolve the question whether Section 3001(i) of RCRA exempts the ash produced at resource recovery facilities from hazardous waste regulation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-3060

ENVIRONMENTAL DEFENSE FUND, INC.
and CITIZENS FOR A BETTER ENVIRONMENT,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO and MAYOR RICHARD M. DALEY,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 88 C 769—James B. Moran, *Chief Judge*

DECIDED JANUARY 29, 1993 [1]
ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES
No. 91-1328

Before BAUER, *Chief Judge,* POSNER and RIPPLE, *Circuit Judges.*

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[1] This decision was originally rendered by unpublished order on January 12, 1993. *See* Circuit Rule 53. The Court has subsequently decided to issue the decision as an opinion.

BAUER, *Chief Judge*. The Supreme Court granted certiorari in this case and vacated our judgment. *Environmental Defense Fund v. City of Chicago*, 948 F.2d 345 (7th Cir. 1991), *vacated*, No. 91-1328, 61 U.S.L.W. 3369 (Nov. 17, 1992). The Court has remanded the case for reconsideration in light of a memorandum issued by the Administrator of the Environmental Protection Agency ("EPA") to regional administrators about the "Exemption for Municipal Waste Combustion Ash From Hazardous Waste Regulation Under RCRA Section 3001(i)." Memorandum of William K. Reilly, Administrator, Environmental Protection Agency, dated September 18, 1992. We have requested and received Circuit Rule 54 Statements of Position from both parties. In our earlier opinion, we ruled that ash generated in the combustion of municipal waste is subject to the regulatory scheme governing hazardous waste set forth in Subtitle C of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901-6992k ("RCRA"). This order assumes familiarity with our earlier opinion in this case, which appears at 948 F.2d 354 (7th Cir. 1991).

The EPA memorandum explains the agency's new interpretation of Section 3001(i) of RCRA, 42 U.S.C. § 6921(i). The agency's new interpretation represents a change in the agency's prior official position that ash generated by the combustion of municipal waste is not included in the Section 3001(i) exemption. *See* 50 Fed. Reg. 28,725-26 (July 15, 1985). Hence, the EPA's interpretation now conflicts with ours.

The agency's change of position and Administrator Reilly's memorandum explaining it do not persuade us that our analysis of the RCRA was in error. As we explained in the original opinion, the EPA has changed its view so often that it is no longer entitled to the deference normally accorded an agency's interpretation of the statute it administers. 948 F.2d at 350. This additional change of position does not alter that conclusion.

Administrator Reilly explained the change of position is justified because the language of Section 3001(i) is ambiguous and its legislative history supports the agency's conclusion that the ash should be exempted under Section 3001(i). These arguments were presented to this court by the City and we considered and rejected them, finding that the plain language of the statute is dispositive. The EPA offers no new support for these arguments in its memorandum, and we continue to find them unpersuasive. Further, because we believe the language of Section 3001(i) is clear, the public policy arguments Reilly discusses in the memorandum cannot override the mandate of the statute. Only Congress may change the law in response to policy arguments, courts may not do so.

Accordingly, upon reconsideration of the parties' statements of position and the memorandum, we hold that the EPA memorandum does not affect our opinion or judgment in this case.

RIPPLE, *Circuit Judge*, dissenting. This case is before us on remand from the Supreme Court of the United States. We have been directed to reconsider our earlier decision in light of the memorandum of the Administrator of the Environmental Protection Agency of September 18, 1992. In my view, despite the varying interpretations given the statute by the agency in the past, we are not, under the circumstances here, entirely relieved of our obligation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to defer to the reasonable interpretation of the agency charged with the administration of the statute. It is true that the Supreme Court has said that "[a]s a general matter . . . the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2535 (1991). The Court has also stressed, however, that "[a]n initial agency interpretation

is not instantly carved in stone." *Chevron*, 467 U.S. at 863. Indeed, the agency has the continuing obligation to ensure that its interpretation is reasonable by considering "varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-64.

The reasonableness of the Administrator's interpretation must be assessed "not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena." *Id.* at 863. As the Solicitor General graphically set out in his brief before the Supreme Court, the basic problem is that Congress has simply failed to address a major environmental policy question. *See* Br. of the United States as Amicus Curiae at 11 n.6, *City of Chicago v. Environmental Defense Fund* (No. 91-1328). Consequently, the Administrator has attempted to resolve the matter on the basis of the available evidence. Here, confronted with the split of authority between two courts of appeals, the Administrator took another look at an admittedly ambiguous issue and reassessed his earlier pronouncements. In my view, this was responsible agency action and is deserving of our deferential review.

While the Administrator's approach differs somewhat from the analysis of my colleagues in the Second Circuit (and while I find Judge Haight's presentation somewhat more convincing than the Administrator's), I do not perceive that tension to be a fundamental one. Accordingly, I would affirm the judgment of the district court. Hopefully, Congress will make the policy decision that needs to be made and the highest court in the land will be spared the necessity of having to deal with what is, at bottom, a problem for the legislative branch.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-3060

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Plaintiffs-Appellants,

v.

THE CITY OF CHICAGO, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
No. 88 C 769—James B. Moran, *Chief Judge*

ARGUED MAY 10, 1991—DECIDED NOVEMBER 19, 1991

Before BAUER, *Chief Judge*, POSNER, and RIPPLE, *Circuit Judges.**

BAUER, *Chief Judge*. In this case, we are asked to determine whether the ash generated by a municipal solid waste incinerator is "hazardous waste" that must be disposed of in accordance with the provisions of Subtitle C

* This opinion was circulated among all judges of this court in regular active service pursuant to Circuit Rule 40(f) because of an apparent conflict with *Environmental Defense Fund v. Wheelabrator Technologies*, 725 F.Supp. 758 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir. 1991). No judge favored rehearing *en banc*; Judge Richard D. Cudahy did not participate.

of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901-6992k ("RCRA"). The incinerator in question—the Northwest Waste-to-Energy Facility—has been owned and operated by the City of Chicago ("the City") since 1971. Faced with rapidly diminishing space for landfill, the City has turned to innovative methods to dispose of the approximately 2.5 million tons of solid waste generated each year. The Northwest Facility was one of the first modern waste-to-energy resource recovery facilities in the United States and the only one in the State of Illinois. Each day, it receives for processing 200 to 250 truckloads of refuse, the bulk coming from residential units. The plant incinerates 350,000 tons of waste annually. The steam generated from the combustion of waste is used to run the facility.

The plaintiffs, the Environmental Defense Fund, Inc., and Citizens for a Better Environment (collectively, "EDF"), filed a complaint against the City and its mayor alleging that the City violated provisions of RCRA and its regulations governing the handling of hazardous waste. EDF maintains that the City is violating RCRA by unlawfully storing, transporting, disposing of, and otherwise handling the by-product of the incineration at the Northwest Facility, the 110,000 to 140,000 tons of ash produced every year. According to the EDF, the toxicity level of the ash is high enough to qualify it as a hazardous waste subject to special treatment under Subtitle C of RCRA. Between 1981 and 1987, thirty-five samples of ash from the Northwest Facility were tested. Out of these, thirty-two exhibited enough lead, cadmium, or both, to meet the standard for Extraction Procedure toxicity, which forms a part of Subtitle C.

Subtitle C establishes a regulatory scheme governing the treatment, storage, and disposal of hazardous wastes. (Non-hazardous waste is governed by Subtitle D of RCRA.) Generators of hazardous waste must apply for and receive a United States EPA identification number

before engaging in the treatment, storage, disposal, transportation, or offering for transportation of hazardous waste. *See* 40 C.F.R. § 262.12. Before shipping, hazardous waste must be packaged, labelled, and marked according to specific regulations. *See* 40 C.F.R. § 262.30-33. Hazardous waste must be accumulated in approved containers and only for specified periods of time. 40 C.F.R. § 262.34. Generators of hazardous waste also must maintain certain records, and file biennial reports with the EPA Regional Administrator. *See* 40 C.F.R. § 262.40-43. The ash produced by the Northwest Facility is not dealt with pursuant to this "cradle to grave" regulatory scheme. Instead, it is shipped off to Michigan for burial in a landfill cite that is not licensed to accept hazardous wastes.

In the district court the parties filed cross motions for summary judgment. The City argued that the ash produced at the Northwest Facility is exempt from regulation under section 3001(i) of RCRA, 42 U.S.C. § 6921(i), which provides that a resource recovery facility will not be deemed to be "treating, storing, disposing of, or otherwise managing" hazardous wastes for the purposes of regulation if the facility meets certain requirements. In addition to filing its own motion for summary judgment, EDF also opposed the City's motion on the ground that the City had not demonstrated that the Northwest Facility met the requirements of section 3001(i).

On November 29, 1989, the district court issued a memorandum and order, holding that section 3001(i) exempted the ash produced at resource recovery facilities from regulation as a hazardous waste. *See Environmental Defense Fund v. City of Chicago*, 727 F. Supp. 419, 424 (N.D. Ill. 1989). The district court, however, denied both motions for summary judgment, allowing EDF additional discovery to determine whether the Chicago facility met the requirements of section 3001(i). In July 1990, EDF stipulated that it would not contest the ade-

quacy of the Northwest Facility's procedures for excluding hazardous wastes and that it would not oppose a renewed motion for summary judgment by the City. On August 20, 1990, the district court granted the City's renewed motion for summary judgment. This appeal followed.

This case turns on the construction of section 3001(i). To make sense of this statute, we must sort through conflicting, often confusing, pronouncements from Congress and the EPA. Indeed, the EPA's various interpretations of the statute have muddied the waters to such an extent that courts have failed to give it the deference normally accorded to an agency's construction of a statute it administers. *See, e.g., Environmental Defense Fund v. City of Chicago,* 727 F. Supp. at 424; *Environmental Defense Fund v. Wheelabrator Technologies,* 725 F. Supp. 758, 766 (S.D.N.Y. 1989), *aff'd,* 931 F.2d 211 (2nd Cir. 1991). The Second Circuit, the only appeals court to interpret section 3001(i) thus far, concluded that the statute exempts the ash remaining after the incineration of municipal solid waste at a resource recovery facility from regulation as a hazardous waste. *Wheelabrator,* 931 F.2d at 213.

As a threshold issue, we must consider whether, as the City suggests, this case has been rendered moot by passage of the 1990 amendments to the Clean Air Act. Section 306 of the amendments provides in part that "[f]or a period of 2 years after the date of enactment . . . ash from solid waste incineration units burning municipal waste shall not be regulated by the Administrator of the Environmental Protection Agency pursuant to Section 3001 of the Solid Waste Disposal Act." Pub. L. No. 101-549, 104 Stat. 2399 (1990). When Congress enacted this provision, it was well aware that this matter was pending on appeal. The accompanying committee report explains, "[t]he conferees do not intend to prejudice or affect in any manner ongoing litigation, including *Environmental Defense Fund v. Wheelabrator, Inc.,* 725 F. Supp. 758 (2d Cir.) [sic] and *Environmental Defense Fund v. City of Chicago,* Appeal No. 90-3060 (7th Cir.) [sic], or any State activity regarding ash." H. Rep. No. 952, 101st Cong., 2d Sess. 335, 342, *reprinted in* 1990 U.S.C.C.A.N. 3867, 3874.

What all this means is that the amendments to the Clean Air Act do not render this matter moot, but rather maintain the status quo until the time Congress reauthorizes RCRA. After that period expires, Congress may determine whether it wishes to revise the statute with regard to the ash question. Although we cannot say for certain, it well may have been that Congress wanted to see what the courts had to say on the issue before undertaking any retooling of the current regulatory scheme. Until then, the EPA is precluded from promulgating regulations on ash pursuant to section 3001(i). Nothing in the amendments, however, suggests that the EPA may not enforce the scheme now in place. What that covers, exactly, is for us to determine.

Having concluded that the matter properly is before us, we turn our attention to the district court's decision. As with all summary judgment determinations, we review the matter *de novo* to decide whether the record as a whole establishes that the defendant was entitled to judgment as a matter of law. *See, e.g., Santella v. City of Chicago,* 936 F.2d 328, 331 (7th Cir. 1991); *Dieckhoff v. Severson,* 915 F.2d 1145, 1148 (7th Cir. 1990). Before we can proceed, we must trace our way through a somewhat complicated statutory and regulatory scheme.

In 1980, EPA issued the "household waste exclusion," a regulation that explicitly exempted household waste from the statutory definition of "hazardous waste." *See* 45 Fed. Reg. 33,120 (codified as amended at 40 C.F.R. § 261.4(b)(1) (1987)). The exclusion had the effect of releasing households and municipalities from the burden of complying with the cumbersome requirements of Sub-

title C. In the preamble to the regulation, the EPA stated that, "[s]ince household waste is excluded in all phases of its management, residues remaining after treatment (*e.g.*, incineration, thermal treatment) are not subject to regulation as hazardous waste." *Id.*

Congress never ratified this statement in the form of legislation. Instead, it enacted section 3001(i) in 1984 as part of the Hazardous and Solid Waste Amendments to RCRA to "clarify" the EPA's household waste exclusion. (Actually, Congress was interested in excluding from the extremely complex regulations that apply to facilities that specifically target hazardous waste municipal incinerators that inadvertently process hazardous materials that slip in with all the other junk.) Section 3001(i) provided the following:

> A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subsection if—
>
> (1) such facility—
>
> (A) receives and burns only—
>
> (i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and
>
> (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section. . . .

42 U.S.C. § 6921(i).

Unlike the EPA preamble, section 3001(i) does not explicitly exempt the ash generated from resource recovery facilities from regulation as a hazardous waste. Nonetheless, each party to this litigation argues that the plain words of section 3001(i) support its position. The EDF

contends that the section 3001(i) exemption covers only very specific activities of municipal incinerators that handle household and commercial waste, including "treating, storing, disposing of, or otherwise managing hazardous wastes," but not the generating of hazardous wastes. In contrast, the City maintains that "managing" hazardous wastes covers everything that a resource recovery facility does, including the disposal of the ash residue resulting from incineration of municipal solid wastes.

The EPA's interpretation and the legislative history of the statute do little to resolve this stand-off. Following adoption of section 3001(i), the EPA incorporated its provisions into EPA regulations. *See* 40 C.F.R. § 261.4 (b)(1). In a preamble to the new regulations, the EPA explained:

> The statute [section 3001(i)] is silent as to whether hazardous residues from burning combined household and non-household, non-hazardous waste are hazardous waste. These residues would be hazardous wastes under present EPA regulations if they exhibited a characteristic. The legislative history does not directly address this question although the Senate report can be read as enunciating a general policy of non-regulation of these resource recovery facilities if they carefully scrutinize their incoming wastes. On the other hand, residues from burning could, in theory, exhibit a characteristic of hazardous waste even if no hazardous wastes are burned, for example, if toxic metals become concentrated in the ash. Thus, the requirement of scrutiny of incoming wastes would not assure non-hazardousness of the residue. EPA believes that the principal purpose of section 3001(g) [sic] was to prevent resource recovery facilities that may inadvertently burn hazardous waste, despite good faith effort to avoid such a result, from becoming subject to the Subtitle C regulations.

50 Fed. Reg. 28,725-26 (July 15, 1985).

Although not an all-out endorsement, this statement certainly runs in favor of subjecting the ash by-product of incineration to Subtitle C regulation. But was, as the EPA suggests, the legislative history silent on the ash question? Both the *Wheelabrator* district court, as affirmed by the Second Circuit, and the district court here held that the legislative history of RCRA demonstrates that Congress intended to exempt resource recovery facilities—and the ash they produce—from hazardous waste statutes and regulations. *See Environmental Defense Fund v. City of Chicago,* 727 F. Supp. at 424; *Wheelabrator,* 725 F. Supp. at 770. For support, both courts heavily rely on a statement in the Report of the Senate Committee on Environment and Public Works, which accompanied the proposed legislation. The Report stated that all waste management activities of such facilities are included within the household waste exclusion, including "the *generation,* transportation, treatment, storage and disposal of waste. . . ." S. Rep. No. 284, 98th Cong., 2d Sess. 61 (1983) (emphasis supplied). The *Wheelabrator* district court indicated that the Report "could not be more explicit":

> It includes the term "generation," that term upon which EDF places so much emphasis. While it is true that the legislation itself does not include the term generation and that it is the legislation with which we are concerned, the legislative history is probative on the issue of Congress' intent, given that the scope of the statute is unclear on its face.

725 F. Supp. at 765.

But was congressional intent, as suggested by the *Wheelabrator* district court, that "explicit?" On October 2, 1987, six senators and a member of the House (Representative Florio) sent two letters to Lee Thomas of the EPA. Both letters struck the same notes. Only the first letter, signed by Senators Stafford, Durenberger, Chafee, Burdick, Baucus, and Mitchell, is reproduced here:

> We are writing to urge that the Agency [EPA] refrain from issuing any policy statements or legal interpretations of the Resource Conservation and Recovery Act as it relates to the management of ash generated by municipal solid waste incinerators pending further consultation and coordination with Congress. We are concerned that the Agency may be on the verge of interpreting these requirements, possibly in a manner inconsistent with the law, at a time our Committee is considering legislation specifically resolving this issue.
>
> In our view, section 3001(i) of the Solid Waste Disposal Act, often known as RCRA, as amended in 1984 does not exempt owners or operators of municipal solid waste incinerators from the obligations: 1) to determine whether the ash residues generated by the incineration process are hazardous wastes, and 2) to handle ash exhibiting hazardous waste characteristics as hazardous wastes in accordance with the requirements of Subtitle C of RCRA. Thus, we concur in the Agency's statement in the preamble to the July 15, 1985 codification rule that in the 1984 amendments Congress did *not* "exempt the regulation [sic] of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste."

Regulation of Municipal Solid Waste Incinerators: Hearings on H.R. 2162 before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce, 101st Cong., 1st Sess. 1-2 (May 11, 1989) ("Hearings on H.R. 2162").

In another development, on May 11, 1989, Congressman Thomas A. Luken, Chairman of the House Subcommittee on Transportation and Hazardous Materials, called a hearing on a proposed bill to regulate municipal solid waste incinerator ash under Subtitle D of RCRA. The

Congressman made the following comments in his opening statement:

> A statutory ambiguity has caused a great deal of uncertainty with respect to how this ash should be regulated. The very basic question of whether or not ash should be regulated under subtitle D, as a solid waste, or under subtitle C as a hazardous waste, remains ambiguous in the statute. . . . This uncertainty has been exacerbated by conflicting signals sent by the EPA. That is not a criticism of EPA. Originally the EPA stated that incinerator ash must be tested for toxicity, and managed accordingly, but more recently the EPA has made various pronouncements which conflict with that original policy. It has become clear that legislative action is needed.

With regard to the EPA's lack of clarity on the subject, the "conflicting signals" to which Congressman Luken was referring begin with the preamble to the household waste exclusion. It most definitely exempted ash from regulation as a hazardous waste. The preamble to the regulation that mirrored section 3001(i), however, did not regard the statute as exempting from regulation ash exhibiting characteristics of hazardous waste. This difference is not explained away by later statements from EPA officials. In December 1987, J. Winston Porter, the Assistant Administrator for the Office of Solid Waste and Emergency Response, testified before the Senate Subcommittee on Hazardous Waste and Toxic Substances of the Committee on Environment and Public Works. Porter responded to a question regarding incinerator ash:

> Currently, EPA's regulations merely restate the statutory language. In the preamble codifying this statutory language, however, EPA advanced an interpretation of the statute that would subject ash residue's [sic] from energy-recovering MWC's [Municipal Waste Combustors] to Subtitle C regulation if the ash exhibited a characteristic of hazardous waste. The Agency has reexamined that interpretation and now concludes that it may have been in error. The Agency believes that the language and legislative history of Section 3001(i) were probably intended to exclude these ash residues from regulation under Subtitle C.
>
> It seems clear that Congress' interest in Section 3001(i) was to encourage energy recovery. Under the section, the reach of the household exclusion was to be extended for facilities that recover energy. The Agency's prior interpretation of the section would restrict the exclusion with respect to ash residue for facilities that recover energy as well as those that do not. This appears inconsistent with the reach of the household exclusion itself (which clearly covers ash). It also appears inconsistent with the expressed legislative intent that "[a]ll waste management activities of such a facility, including the generation, transportation, treatment, storage, and disposal of waste shall be covered by the exclusion."

Hearings on H.R. 2162, 16-17 (testimony of J. Winston Porter).

Just a few months later, in May 1988, Sylvia Lowrance, who was at that time the Director of the EPA's Office of Solid Waste, offered the following testimony to the same congressional hearing:

> In our codification of [section 3001(i)] we stated that, in our view, the provision excludes energy recovery facilities burning household waste along with nonhazardous waste from commercial and industrial sources from regulation under subtitle C.
>
> With regard to the ash, however, produced from such facilities, we said in a 1985 notice that the ash generated by these facilities which exhibits a characteristic of the hazardous waste must be managed as a hazardous waste.

We continue to follow that 1985 policy, and that is our current interpretation. However, there is substantial controversy surrounding that interpretation. We are in litigation challenging the EPA's interpretation of section 3001(i). We believe the law is ambiguous given it is silent with regard to treatment of ash under that section.

We do believe it needs to be clarified. What we believe is of paramount importance is that ash be safely managed in a technically sound matter [sic].

Until this legal controversy is resolved, there is going to continue to be uncertainty on the part of communities trying to deal with their garbage crisis with regard to what ultimate requirements and cost will be for their municipal and waste management.

We very much support an approach such as the one taken in H.R. 2162, which would provide clear authority to the EPA to regulate municipal combustor ash as a special waste under subtitle D of RCRA.

Id. at 33 (testimony of Sylvia Lowrance).

So there you have it. In construing a statute, we ordinarily have many tools at our disposal: the language and apparent purpose of the statute, its background and structure, its legislative history, and the bearing of related statutes. What we have to work with here is a statute subject to varying interpretations, a foggy legislative history, and a waffling administrative agency. Where do we turn? The see-sawing statements from the EPA to which the district court gave "little weight" deserve no weight at all. The Report of the Senate Committee on Environment and Public Works, which accompanied the proposed legislation, included the generation of waste within the household waste exclusion. Can we just ignore the Report, even though the word "generating" is nowhere to be found in the enacted statute?

It has been argued, both in this circuit and, most notably in the Supreme Court opinions of Justice Antonin Scalia, that recourse to legislative history to clarify the meaning of statutory language is, at best, a shaky endeavor. Justice Scalia has written that use of legislative history

> is neither compatible with our judicial responsibility of assuring reasoned, consistent and effective application of [statutes], nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis . . . in committee reports that are increasingly unreliable evidence of what the voting Members of Congress had in mind.

Blanchard v. Bergeron, 489 U.S. 87, 99 (1989) (Scalia, J. concurring in part and concurring in the judgment). And as our Brother Easterbrook has noted regarding pre-enactment legislative history,

> [i]t is a poor guide to legislators' intent because it is written by the staff rather than by members of Congress, because it is often losers' history . . . , because it becomes a crutch . . . , because it complicates the task of execution and obedience (neither judges nor those whose conduct is supposed to be influenced by the law can know what to do without delving into legislative recesses, a costly and uncertain process).

Matter of Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989). In addition, post-enactment statements, such as we have here, bear no necessary relationship to the forces at work at the time of enactment: the preferences of the enacting legislator and his or her constituency and the impact of pressure groups.

Every time Congress enacts legislation, it is acting in context. Although "[l]egislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words

would be understood," *Sinclair*, 870 F.2d at 1342, statements made before and after enactment are not necessarily the final word as to meaning. Congress was well aware of the EPA's position on ash when it enacted section 3001(i). Although tossed around, the word "generation" was not used in the final product. Why should we, then, rely upon a single word in a committee report that did not result in legislation? Simply put, we shouldn't. The actual words of the statute—the end product of the rough-and-tumble of the political process—are the definitive statement of congressional intent.

Our task becomes simpler if we just begin with what the statute actually says. *See Watt v. Alaska*, 451 U.S. 259, 265 (1981). Section 3001(i) mentions "the treating, storing, disposing of or otherwise *managing*" of the household and commercial waste," but fails to include among these activities *generating* a different waste product entirely. To borrow a phrase from computer programmers, resource recovery quite literally is "garbage in, garbage out," but the "garbage" that emerges from the incineration process—ash—is fundamentally different in its chemical and physical composition from the plastic, paper, and other rubbish that goes in. It does not follow that the generation of hundreds of tons of a whole new substance with the characteristic of a hazardous waste should be exempt from regulation just because Congress wanted to spare individual households and municipalities from a complicated regulatory scheme if they inadvertently handled hazardous waste. Such a reading of section 3001(i) would be inconsistent with RCRA's policy of encouraging the careful management of materials that pose a danger to human health and the environment.

Moreover, contrary to the City's assertions, "otherwise managing" and "generating" are not coextensive terms. Statutory construction is a holistic endeavor: the only permissible meaning is that which is compatible with the "flesh and bones" of a law, from its overarching purpose down to its individual words. Here, the individual words

in RCRA are so carefully defined, they cannot be interchangeable. Hazardous waste "management" is defined to include a limited number of activities, including the "collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes." 42 U.S.C. § 6903(7). The statute goes on to define some of these terms. Two of the most important words for our purposes are defined in the following manner. "Treatment" means:

> any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any physical activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

42 U.S.C. § 6903(34). The term "disposal" means:

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3). These definitions exclude "generation," which is separately defined as "the act or process of producing hazardous waste." 42 U.S.C. § 6903(6). There is no overlap whatsoever, then, between hazardous waste "management" and hazardous waste "generation." It follows, therefore, that if the language of the exclusion is limited to "management" activities of resource recovery facilities, "generating" activities are subject to regulation.

We should take at face value a statute's plain language so long as our reading is not absurd; we should ignore a legislative history that results in a reading that is. It is unlikely that Congress, in an express effort to promote the proper disposal of dangerous substances that otherwise would seep into the ground and water table, would sanction the dumping of massive amounts of hazardous waste in the form of ash into ordinary landfills. Accordingly, we hold that the ash generated from the incinerators of municipal resource recovery facilities is subject to regulation as a hazardous waste under Subtitle C of RCRA. The decision of the district court is

REVERSED.

RIPPLE, *Circuit Judge*, dissenting. For the reasons set forth in *Environmental Defense Fund v. Wheelabrator Technologies*, 725 F. Supp. 758 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir. 1991), I would affirm the judgment of the district court.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 88 C 769

ENVIRONMENTAL DEFENSE FUND, INC. and
CITIZENS FOR A BETTER ENVIRONMENT,
Plaintiffs,

vs.

CITY OF CHICAGO and RICHARD M. DALEY,
Mayor of the City of Chicago,[1]
Defendants.

MEMORANDUM AND ORDER

Plaintiffs Environmental Defense Fund, Inc. (EDF) and Citizens for a Better Environment (CBE) bring this action against the City of Chicago and its Mayor, seeking injunctive relief and civil penalties under Section 7002 of the Resource Conservation and Recovery Act (RCRA). Plaintiffs allege that the City has violated certain provisions of RCRA, 42 U.S.C. § 6901 *et seq.*, by generating hazardous waste and not complying with the hazardous waste requirements under RCRA, subtitle C. 42 U.S.C. §§ 6921-6939(b). We have before us plaintiffs' and defendants' cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the following reasons, both motions are denied and plaintiffs are granted leave for additional discovery.

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[1] Pursuant to Fed.R.Civ.P. 25(d) Richard M. Daley is substituted as a defendant in this action. He succeeds Eugene Sawyer as Mayor of the City of Chicago.

FACTS

The City is the owner and operator of a facility known as the Chicago Northwest Incinerator, located at 700 N. Kilbourn Avenue in Chicago. This was one of the first modern waste-to-energy resource recovery facilities in the United States and is the only such facility in Illinois (aff. of John Ellis, plant manager, Dept. of Streets and Sanitation, Chicago, at ¶ 3). Resource recovery facilities use highly engineered and controlled incineration technology to process solid wastes, reducing their volume and recovering usable energy in the form of steam or electricity (aff. of Mosi Kitwana, Deputy Commissioner of Sanitation, Chicago, at ¶ 10). The Northwest facility receives 200 to 250 truckloads of refuse each weekday and processes some 350,000 tons of solid municipal waste annually (Ellis aff. ¶ 7). According to Mr. Kitwana, at least 99% of the waste received at the facility consists of household waste (Kitwana aff. ¶ 14). The remainder of the waste consists of commercial waste—primarily paper and foodstuffs brought into the United States by international flights arriving at O'Hare Airport—and small quantities of contraband seized by law enforcement officials (Kitwana aff. ¶ 14). The City contends that this waste, and the small amounts of commercial waste collected in Chicago, do not contain hazardous materials.

The facility is supposed to maintain rigid inspection procedures. Household waste shipments are allegedly spot-checked to ensure that they do not contain hazardous wastes and commercial shipments carefully screened—all to prevent the acceptance of hazardous wastes (Kitwana aff. ¶ 15). Commercial waste shipments must also be approved by the Bureau of Sanitation prior to acceptance. Finally, all commercial waste is supposed to be physically examined and any hazardous materials found are to be sent back to the generator for proper disposal (Kitwana aff. ¶ 15).

Once the waste has been delivered, and inspected for hazardous materials, it is processed through the facility

and reduced to an ash residue. The status of this ash is what is at issue in this matter. Plaintiffs allege that the ash is hazardous waste [2] and that the City has failed to comply with the cradle-to-grave regulatory system that governs storage, transport, disposal, and other handling of hazardous wastes. *See* 42 U.S.C. §§ 6921 *et seq.*; 40 CFR §§ 262.10 *et seq.*

The City contends that the ash remaining after incineration at the Northwest facility is from a non-hazardous waste stream and thus exempt from hazardous waste regulations. It moves for summary judgment alleging that there are no genuine issues of material fact in dispute, and that 49 U.S.C. § 6921(i) and 49 CFR § 261.4 (b)(1) specifically exclude all waste management activities of resource recovery facilities that receive household waste and non-hazardous commercial waste. On cross-motions, plaintiffs contend that the generation of toxic ash is not exempt from hazardous waste regulation and that only certain activities of resource recovery facilities are exempt.

DISCUSSION

The central issue in this action is whether the ash residue remaining after incineration is a hazardous waste under subtitle C, or only a solid waste regulated under subtitle D. Statutory ambiguity has caused a great deal of uncertainty with respect to how this ash should be regulated. Plaintiffs contend that toxic ash generated by resource recovery facilities is hazardous and subject to hazardous waste regulation. Defendants, on the other hand, contend that ash remaining after the incineration of household and non-hazardous commercial waste is exempt from subtitle C regulation. We agree.

---

[2] Plaintiffs contend that 32 samples of ash generated at the Northwest Facility have been tested for toxicity pursuant to the EP toxicity test. Of those samples, 29 have exhibited levels of lead and/or cadmium that exceed the level qualifying it as hazardous waste (pl. cplt. ¶ 15).

The Resource Conservation and Recovery Act was enacted by Congress to address our growing national solid waste crisis, to promote the protection of health and the environment, and to conserve valuable material and energy resources. 42 U.S.C. § 6902. The RCRA classifies wastes as either hazardous (regulated under C, 42 U.S.C. §§ 6921-6939(b)) or as non-hazardous (regulated under D, 42 U.S.C. §§ 6941-6949(a)). Subtitle C imposes rigorous safeguards and procedures on hazardous waste management, while D essentially forbids the disposal of solid waste in open dumps and provides significantly less regulation than C. When Congress first enacted the RCRA in 1976 it did not initially identify which wastes were subject to hazardous waste regulation. Rather, it required the EPA to develop and promulgate criteria for identifying hazardous wastes. 42 U.S.C. § 6921(a). In 1980 the EPA issued regulations identifying and listing hazardous wastes. Included in these regulations was a provision known as the "household waste exclusion." 45 Fed.Reg. 33,120 (May 19, 1980). That provision exempted the entire household waste stream, including the ash residue from household waste, from hazardous waste regulation and provided, in pertinent part, as follows:

> § 261.4 EXCLUSIONS
>
> (b) *Solid wastes which are not hazardous wastes.* The following solid wastes are not hazardous wastes:
>
> (1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (*e.g.*, refuse-derived fuel) or reused. "Household waste" means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels.)

45 Fed.Reg. 33,120 (May 19, 1980) (codified as amended at 40 CFR § 261.4(b)(1) (1982).

In the preamble to these regulations the EPA restated its view that ash from the incineration of household waste should be excluded from hazardous waste regulation, stating:

> The Senate language makes clear that household waste does not lose the exclusion simply because it has been collected. Since household waste is excluded in all phases of its management, *residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as a hazardous waste*. Such wastes, however, must be transported, stored, treated and disposed in accord with the applicable state and federal requirements concerning the management of solid waste . . . .

45 Fed.Reg. 33,098 (May 19, 1980) (emphasis added). When Congress amended the RCRA in 1984 to clarify the household waste exclusion, it left unmodified the EPA's 1980 interpretation that ash from the incineration of household waste should be excluded from hazardous waste regulation. 42 U.S.C. § 6921(i). Additionally, Congress expanded this exclusion to include resource recovery facilities that also burn non-hazardous commercial or industrial solid waste. The statute currently reads:

> (i) *Clarification of Household Waste Exclusion*
>
> A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purpose of regulation under this subchapter, if—
>
> (1) such facility—
>
> (A) receives and burns only—

> (i) household waste (from single and multiple dwellings, hotels, motels and other residential sources), and
>
> (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
>
> (B) does not accept hazardous wastes identified or listed under this section, and
>
> (2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

42 U.S.C. § 6921(i) (1984).

The fact that Congress amended the RCRA without directly renouncing the EPA's 1980 interpretation that ash from household waste is excluded from hazardous waste regulation is significant. "Congressional failure to revise or repeal [an] agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Young v. Community Nutrition Institute*, 476 U.S. 974, 983 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974), *rev'd on other grounds, NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981)). Congress having left untouched the EPA's 1980 interpretation is persuasive evidence that it intended to exclude ash such as this from subtitle C regulation.

Plaintiffs argue, however, that Congress did not intend the household waste exclusion to apply to generators of hazardous wastes such as defendants. According to plaintiffs, the 1984 amendment exempts only certain activities of resource recovery facilities (namely the treating, storing, disposing of or otherwise managing certain specified

wastes) and does not exclude the generation of hazardous waste. Indeed, the current RCRA statute contains no language indicating that waste such as ash, generated by resource recovery facilities, should be excluded from hazardous waste regulation. Therefore, plaintiffs' claim that defendants must comply with the RCRA's hazardous waste requirements because the ash defendants are generating is hazardous. We find this reasoning unpersuasive.

When Congress amended the RCRA and clarified the household waste exclusion, it meant to exclude all of the waste management activities of a resource recovery facility from subtitle C regulation. This interpretation is consistent with the RCRA's stated policy goal of encouraging commercially-viable resource recovery facilities and removing impediments which may hinder their development and operation. The Senate Report which accompanied the 1984 RCRA amendments supports this reading and, in fact, defines the waste management activities of a resource recovery facility to include generation. The report provides that

> [a]ll waste management activities of [resource recovery facilities,] including the *generation*, transportation, treatment, storage and disposal of waste shall be covered by the exclusion . . . .

S.Rep. No. 284, 98th Cong., 1st Sess. 61 (1983) (emphasis added).

That the EPA 1980 household waste exclusion does not include the words "generation" or "ash," but nevertheless excludes the generation of ash from hazardous waste regulation, provides further support that Congress meant to exclude ash generated from household waste from subtitle C. *See* 45 Fed.Reg. 33,120 (May 19, 1980). Plaintiffs do not dispute that the EPA initially interpreted the household waste exclusion as excluding all of the waste management activities of municipal incinerators accepting only household wastes. In fact, plaintiffs concede that the 1980 household waste exclusion was a "waste stream" exclusion (pl. mem. at 20). Nonetheless, plaintiffs contend that the 1984 RCRA statute does not pertain to the entire waste stream but, rather, is limited to a class of resource recovery facilities that must meet certain requirements. We disagree. Because the original household waste exclusion covered the management of ash residue, and the 1984 clarification left untouched this interpretation, we conclude that Congress must have meant to adopt the EPA's position. Had Congress intended to change this interpretation, it would have so indicated in the 1984 amendment.

The United States Conference of Mayors and the National Resource Association have filed an amicus brief in support of the City's position and the Institute of Resource Recovery has done likewise.[3] They claim that landfill capacity for hazardous wastes is limited, is being rapidly depleted and is not being replaced, and that a requirement that ash be disposed of as a hazardous waste would imperil the entire resource recovery program. Plaintiffs dispute that gloomy assessment. Whether that assessment is true or not, we are not persuaded that Congress changed obligations by implication and without specifically addressing and rejecting those concerns.

Since the 1984 amendment, the EPA has issued new regulations interpreting the household waste clarification provision. 40 CFR 261.4(b)(1) (1985). Plaintiffs argue that these regulations provide further support that Congress did not intend to exclude the generation of ash from hazardous waste regulations. In the preamble to these regulations, the EPA seemed to believe that the 1984 statute modified the earlier policy on ash. The EPA stated that it did not see the 1984 amendments as an attempt

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[3] We here grant their motions to file those briefs.

to exempt the regulation of ash residue.[4] *See* 50 Fed.Reg. 28,726 (1985). Recent statements from some EPA officials, following the issuance of the 1985 regulations, have also indicated that the EPA does not consider ash to be exempt from hazardous waste regulation. *See* Testimony of Sylvia Lowrance, Director, Office of Solid Waste, EPA, at *Regulation of Municipal Solid Waste Incinerators: Hearings Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 101st Congress, 1st Session (May 11, 1989).

Other EPA officials who have examined the 1985 interpretation have concluded that that interpretation, however, may have been in error. On December 3, 1987, J. Winston Porter, assistant administrator for Solid Waste and Emergency Response, testified before the Senate Committee on Environment and Public Works and stated that

[4] The EPA interpreted the clarification as follows:

> The statute is silent as to whether hazardous residues from burning combined household and non-household, non-hazardous waste are hazardous waste. These residues would be hazardous wastes under present EPA regulations if they exhibited a characteristic. The legislative history does not directly address this question although the Senate report can be read as enunciating a general policy of non-regulation of those resource recovery facilities if they carefully scrutinize their incoming wastes. On the other hand, residues from burning could, in theory, exhibit a characteristic of hazardous waste even if no hazardous wastes are burned, for example, if toxic metal becomes concentrated in the ash. Thus, the requirement of scrutiny of incoming wastes could not assure non-hazardousness of the residue. EPA believes that the principal purpose of section 3001(g) [sic] was to prevent resource recovery facilities that may inadvertently burn hazardous waste, despite good faith efforts to avoid such a result from becoming subject to the Subtitle C regulations. EPA does not see in this provision an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery facilities if the ash routinely exhibits a characteristic of hazardous waste.

50 Fed.Reg. 28,725-26 (7/15/85).

> [t]he Agency has reexamined that [1985] interpretation and now concludes that it may have been in error. The Agency believes that the language and legislative history of Section 3001(i) [42 U.S.C. § 6921(i)] were probably intended to exclude these ash resides from regulation under Subtitle C.
>
> It seems clear that Congress' interest in Section 3001(i) was to encourage energy recovery. Under the section, the reach of the household exclusion was to be extended for facilities that recover energy. The Agency's prior interpretation of the section would restrict the exclusion with respect to ash residue for facilities that recover energy as well as those that do not. This appears inconsistent with the reach of the household exclusion itself (which clearly covers ash). It also appears inconsistent with the expressed legislative intent that "[a]ll waste management activities of such a facility, including the generation, transportation, treatment, storage, and disposal of waste shall be covered by the exclusion . . . ."

S.Rep. at 61.

In addition, after stating in the 1985 interpretation that it did not perceive the RCRA amendments as an attempt to exempt the regulation of ash residue, the EPA indicated its confusion on the matter by stating that it

> does not believe the HSWA [1984 Hazardous and Solid Waste Amendments] impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities. Given the highly beneficial nature of resource recovery facilities, any future additional regulation of their residues would have to await consideration of the important technical and policy issues that would be posed in the event serious questions arise about the residues.

50 Fed.Reg. 28, 726 (1985).

As the agency primarily responsible for administering the RCRA, the EPA should be entitled to some deference in its interpretations regarding the regulation of ash residue. However, because the EPA's classification of ash rests on a questionable reading of the statute and has been, at best, inconsistent, it should be given less weight than it would normally be accorded.[5] *See Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1986) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view"). For this reason, we find that the EPA's 1985 interpretation—classifying ash from household and commercial waste as hazardous if it exhibits characteristics of toxicity—does not affect our decision.

Thus, contrary to plaintiffs' interpretation of RCRA, we conclude that ash remaining after the incinceration of household waste and non-hazardous commercial waste is exempt from regulation if the resource recovery facility satisfies the criteria of § 3001(i).

Defendants insist that the Chicago Northwest Incinerator does meet those criteria and have submitted affidavits to the effect that virtually all the waste received and burned is household waste, that the very limited commercial and industrial waste processed does not contain hazardous wastes, that the facility does not accept hazardous wastes and that appropriate procedures are in place to assure that hazardous wastes are not received at or burned in the facility. Plaintiffs dispute those conclu-

[5] Even if the EPA's 1985 interpretation was entitled to deference in these proceedings, it would not be binding on this court. "Interpretative rules are statements as to what the administrative officer thinks the statute or regulation means, whereas legislative rules have effects *completely independent* of the statute." United Technologies Corp. v. United States Environmental Agency, 831 F.2d 714, 718 (D.C. Cir. 1987) (citations omitted) (emphasis in original).

sions but they can, for now, point to little other than the toxicity tests to support their disagreement. Until now the focus of this lawsuit has been the statutory interpretation issue. Plaintiffs have lost on that issue. They are not foreclosed, however, from conducting reasonable discovery to test the defendants' affidavit assertions. Rule 56(f) so permits. Until they have had an opportunity to do so, we cannot conclude that defendants, beyond reasonable dispute, have complied with the conditions needed to exempt resource recovery facilities from hazardous waste regulation when burning household and commercial waste. Although defendants maintain that the incinerator does not accept hazardous wastes, and that they have established sufficient notification and inspection procedures to prevent this, these issues must be regarded as disputed issues of material fact that preclude the award of summary judgment.

CONCLUSION

For the foregoing reasons, both plaintiffs' and defendants' cross-motions for summary judgment are denied; plaintiffs are granted leave for additional discovery.

/s/ James B. Moran
JAMES B. MORAN
Judge
United States District Court

November 29, 1989.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 88 C 769

ENVIRONMENTAL DEFENSE FUND, INC., *et al.*

v.

CITY OF CHGO *et al.*

JUDGMENT IN A CIVIL CASE

[Docketed Aug. 21, 1990]

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That based upon the Memorandum and Order of November 27, 1989, the stipulation of the parties and defendants' renewed motion for summary judgment, the renewed motion for summary judgment is granted, without prejudice to plaintiffs' right to appeal the final judgment entered herein.

Dated: August 20, 1990

H. STUART CUNNINGHAM
Clerk

/s/ Willie A. Haynes
WILLIE A. HAYNES
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 88 C 0769

Judge James B. Moran

ENVIRONMENTAL DEFENSE FUND, INC. and
CITIZENS FOR A BETTER ENVIRONMENT,
Plaintiffs,

v.

CITY OF CHICAGO, *et al.*,
Defendants.

STIPULATION OF PLAINTIFFS ENVIRONMENTAL DEFENSE FUND AND CITIZENS FOR A BETTER ENVIRONMENT AND DEFENDANTS CITY OF CHICAGO ET AL. WITH REGARD TO ENTRY OF SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

1. On November 27, 1989, this Court ruled herein that, as a matter of law, ash generated by the Northwest Waste-to-Energy Facility ("Facility") owned by defendant City of Chicago is exempt from regulation as a hazardous waste under Subtitle C of the Resource Conservation and Recovery Act ("RCRA") if defendants meet the two statutory conditions set forth in section 3001(i) of RCRA. Memorandum Opinion and Order of November 27, 1989. Those conditions pertain to the existence of contracts or other appropriate procedures to assure that the Facility does not receive or process hazardous wastes, and to non-acceptance of hazardous wastes by the Facility. The Court directed the parties to engage in discovery

with regard to whether the Facility meets these two statutory conditions.

2. Subsequent to issuance of the Court's Memorandum and Order, discovery has been completed.

3. Defendants stipulate that, within 60 days of the entry of this Stipulation they will implement the changes specified in Attachment A to this Stipulation.

4. Contingent upon defendants' performance of the condition stated in paragraph 3 of this Stipulation, plaintiffs hereby stipulate that they will not contest, challenge, or otherwise pursue in this litigation:

(a) the adequacy of the Facility's current procedures for excluding hazardous wastes;

(b) whether the Facility currently accepts hazardous wastes for processing;

(c) the adequacy of the Facility's prior procedure for excluding hazardous wastes;

(d) whether the Facility previously accepted hazardous wastes for processing.

5. Contingent upon defendants' performance of the conditions stated in paragraph 3 of this stipulation, plaintiffs further stipulate that they will not oppose a renewed motion by defendants for entry of summary judgment in favor of defendants. In so stipulating, plaintiffs expressly reserve their right to appeal the final judgment insofar as the judgment rests upon the rulings set forth in the Court's Order and Memorandum of November 27, 1989.

Respectfully submitted,

/s/ Karen Florini
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Dated: July 2, 1990

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Counsel For Defendants

June 27, 1990

ATTACHMENT A

To the Acceptable Waste Certification form used by the City of Chicago at the Northwest Waste-to-Energy Facility, the following material underlined shall be added to the form, and material bracketed shall be deleted as follows:

> "Hazardous waste defined as a waste or combination of wastes, which has been identified by characteristic or listing as hazardous pursuant to Section 3001 of the Resource Conservation and Recovery Act of 1976 or pursuant to regulations promulgated by the Illinois Pollution Control Board, [and which poses a threat to health and safety].
>
> ". . . .
>
> "Oil, cesspool or other human wastes . . . *and small quantity generator wastes as defined at 40 C.F.R.* sec. 260.10."

CITY OF CHICAGO
DEPARTMENT OF STREETS AND SANITATION
ACCEPTABLE WASTE CERTIFICATION

DATE MONTH DAY YEAR

I understand that the Northwest Waste-to-Energy Facility accepts only household waste and non-hazardous and otherwise acceptable commercial and Industrial waste, and that under no circumstances will the Northwest-Waste-to-Energy Facility accept any of the following unacceptable waste:

> Hazardous waste, defined as a waste or combination of wastes which has been identified, by characteristic or listing, as hazardous pursuant to Section 3001 of the Resource Conservation and Recovery Act of 1976 or pursuant to regulations promulgated by the Illinois Pollution Control Board.
>
> Any waste which because of its nature or bulk will adversely affect operation of the facility.
>
> Oil, cesspool or other human wastes, human and animal remains, hospital or medical waste, wire and cable, tree logs and wood greater than twelve inches in diameter, liquid waste, non-burnable construction material and/or demolition debris, asbestos and asbestos products, explosives including ammunition and fire arms, chemicals including any empty containers thereof, such as cleaning fluid, flammables, petroleum products including drained oils, paints, acids, caustics, pesticides, insecticides, poisons, drugs, and small quantity generator wastes as defined in the resource conservation and recovery Act (RCRA) at 40 C.F.R. section 260.10.

I hereby certify that the waste delivered in this vehicle contains no unacceptable waste, as defined above. I understand that should the operators of the Northwest Waste-to-Energy Facility discover unacceptable waste in

this vehicle, that it will not be disposed of at the Northwest Waste-to-Energy Facility and must be returned to the owner.

_____

DRIVER _____ TIME STAMP

VEHICLE LICENSE NO. _____

WASTE AUTHORIZATION FORM #_____

_____

[SEAL]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

[Sept. 18, 1992]

The Administrator

MEMORANDUM

TO: All Regional Administrators

SUBJECT: Exemption for Municipal Waste Combustion Ash From Hazardous Waste Regulation Under RCRA Section 3001(i)

PURPOSE

This Memorandum sets forth the United States Environmental Protection Agency's ("EPA" or "Agency") decision under section 3001(i) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6921(i),[1] to treat ash generated from the combustion of nonhazardous municipal solid waste at resource recovery facilities (hereinafter "MWC ash") as exempt from hazardous waste regulation under RCRA Subtitle C. EPA believes that MWC ash can be regulated in a manner that will be protective of human health and the

---

[1] As part of the Hazardous and Solid Waste Amendments of 1984, Congress amended RCRA by adding section 3001(i), which provides, in pertinent part:

> (i) Clarification of household waste exclusion
>
> A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous waste for purposes of regulation under [Subtitle C] if . . . such facility . . . receives and burns only . . . household waste . . . and solid waste from commercial or industrial sources that does not contain hazardous waste . . . .

RCRA section 3001(i)(1), 42 U.S.C. § 6921(i)(1). Section 3001(i) is codified in EPA's regulations as part of the household waste exclusion. 40 C.F.R. 261.4(b)(1).

environment under RCRA Subtitle D. The determination set forth herein supersedes the Agency's earlier view of section 3001(i) as not exempting MWC ash from hazardous waste regulation. *See* 50 Fed. Reg. 28702, 28725-26 (1985).

ANALYSIS

Text of the Statute

EPA's determination that MWC ash is exempt from hazardous waste regulation is consistent with the text of section 3001(i). As proclaimed by the title of section 3001(i)—"Clarification of household waste exclusion"—in enacting that provision, Congress was building upon the regulatory framework it earlier had established. In enacting RCRA in 1976, Congress indicated that solid waste from households, which frequently includes materials that may contain hazardous constituents, should not be regulated as hazardous waste under Subtitle C. S. Rep. No. 94-988, 94th Cong., 2d Sess. 16 (1976). EPA codified Congress' intent in the so-called "household waste exclusion," promulgated in 1980, which provides that "any material . . . derived from households . . . is not hazardous waste . . . ." 40 C.F.R. 261.4(b)(1).

In the preamble to the Federal Register notice announcing the household waste exclusion, EPA clearly stated that the exclusion extends to ash remaining after household waste is incinerated: "Since household waste is excluded in all phases of its management, residues after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. 33066, 33098 (1980). The Agency justified its determination that ash derived from the incineration of household waste is subject to the exclusion on the ground that Congress intended to "exclude *waste streams* generated by consumers at the household level." *Id.* (emphasis added).

In enacting section 3001(i), Congress arguably extended the regulatory exclusion for ash derived from the incineration of household waste to similar residues generated by resource recovery facilities from the incineration of household waste *and* nonhazardous commercial and industrial solid waste. To the extent that household waste alone is incinerated, section 3001(i) coincides with EPA's earlier interpretation of the household waste exclusion as exempting ash derived from such waste from hazardous waste regulation. The inclusion in section 3001(i) of nonhazardous commercial and industrial waste, along with household waste, suggests that Congress may have intended that MWC ash resulting from the combustion of those combined wastes also should not be subject to regulation as a hazardous waste.

In addition, congressional intent to exempt MWC ash from hazardous waste regulation is suggested by the portion of section 3001(i) which provides that a resource recovery facility shall not be deemed to be "treating, storing, *disposing of*, or otherwise managing" hazardous waste. (Emphasis added.) Nothing ordinarily is "disposed of" when a resource recovery facility receives or stores a nonhazardous solid waste, and the burning of such waste generally is regarded as a type of treatment under RCRA. *See* RCRA sections 1004(3) and (34), 42 U.S.C. § 6903(3) and (34) (definitions of "disposal" and "treatment"). As a result, since MWC ash ordinarily is the only waste "disposed of" by such a facility, Congress arguably intended that MWC ash not be regarded as a hazardous waste.

For the foregoing reasons, EPA believes that the text of section 3001(i) is consistent with the Agency's determination that MWC ash is exempt from hazardous waste regulation.

Legislative History

EPA's determination that MWC ash is exempt from hazardous waste regulation also is consistent with the legislative history of section 3001(i). First, a Report of the Senate Committee on Environmental and Public Works addressing section 3001(i) specifically states that "[a]ll waste management activities of such a [resource recovery] facility, including the *generation*, transportation, treatment, storage and disposal of waste shall be covered by the exclusion."[2] S. Rep. No. 98-284, 98th Cong., 1st Sess. 61 (1983) (emphasis added).[3] Since MWC ash ordinarily is the only waste "generated" by a resource recovery facility, Congress arguably demonstrated its intent that MWC ash not be regarded as a hazardous waste.

Second, the Senate Report states that section 3001(i) was enacted to "encourage commercially viable resource recovery facilities and . . . remove impediments that may hinder their development and operation." S. Rep. No. 98-284, 98th Cong., 1st Sess. 61 (1983). As noted

[2] Unlike the legislative history for section 3001(i), the statute does not expressly state that the "generation" of waste by a resource recovery facility is included within the exemption. At most, the absence of that term reflects that Congress did not expressly address the precise issue of whether MWC ash should be exempt from hazardous waste regulation, and does not indicate that Congress intended that MWC ash be regulated as a hazardous waste. In such a circumstance, the Agency has discretion to adopt a reasonable interpretation that best serves the goals embodied in section 3001(i). EPA has exercised that discretion in adopting the interpretation set forth herein, as discussed more fully below.

[3] The Senate Report is entitled to special weight because the Conference Committee adopted, without change, the Senate version of section 3001(i). H.R. Rep. No. 98-1133, 98th Cong., 2d Sess. 106 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 5677. In passing the Senate version of section 3001(i), Congress also impliedly adopted the Senate's interpretation of that provision set forth in the Senate Report.

above, one of the significant features of section 3001(i) is that it applies to resource recovery facilities that burn both household waste *and* nonhazardous commercial and industrial waste. If section 3001(i) were interpreted as not exempting MWC ash derived from the incineration of combined household waste and nonhazardous commercial and industrial waste from regulation as hazardous waste, the policy goal stated in the Senate Report could be substantially frustrated. As a practical matter, the cost benefit to a resource recovery facility in being able to burn both household and nonhazardous commercial and industrial waste would be significantly reduced if MWC ash must be disposed of as a hazardous waste, as discussed more fully below.

Third, the Senate Report refers to the wastes being incinerated in resource recovery facilities as "waste streams," as follows:

> Resource recovery facilities often take in . . . "household wastes" mixed with other non-hazardous *waste streams* from a variety of sources other than "households." . . . New section 3001[i] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

Id. (emphasis added). As noted above, the Agency justified its determination that ash derived from the incineration of household waste is excluded from hazardous waste regulation on the ground that Congress intended to "exclude *waste streams* generated by consumers at the household level." 45 Fed. Reg. 33066, 33098 (1980) (emphasis added). In also using the term "waste stream" in the Senate Report, Congress arguably demonstrated its intent that section 3001(i) be construed as extending the household "waste stream" exclusion to the entire "waste stream" at a resource recovery facility, including MWC

ash derived from the burning of combined household *and* nonhazardous commercial and industrial waste.

In sum, the legislative history of section 3001(i) is consistent with the Agency's determination to exempt MFC ash from hazardous waste regulation.

Policy Considerations

As discussed above, EPA believes that the text and legislative history of section 3001(i) are consistent with the Agency's view that MWC ash is exempt from hazardous waste regulation. Since Congress did not in the statute or legislative history expressly address the precise issue of whether MWC ash should be exempt from hazardous waste regulation, the Agency has discretion to adopt a reasonable interpretation that best serves the goals embodied in section 3001(i). EPA has exercised that discretion in adopting the interpretation set forth herein. EPA believes that the two statutory goals embodied in section 3001(i)—protecting the environment and promoting resource recovery from nonhazardous solid waste—are best served by exempting MWC ash from hazardous waste regulation.

EPA has determined that MWC ash can be regulated in a manner that will be protective of human health and the environment under Subtitle D. In particular, EPA recently promulgated new criteria for municipal solid waste landfills at 40 C.F.R. Part 258, 56 Fed. Reg. 50978 (1991). Municipal landfills and monofills receiving MWC ash must comply with those criteria.[4] The Part 258 cri-

[4] In the preamble to the Federal Register notice announcing the final Part 258 criteria, EPA stated that "[t]he purpose of part 258 is to establish minimum national criteria for municipal solid waste landfills, including [such landfills] used for . . . disposal of nonhazardous municipal waste combustion (MWC) ash (whether the ash is co-disposed or disposed of in an ash monofill)." *See also* response to comment document nos. 155, 168, 171, 172, and 199 in the public record for the Part 258 rulemaking (docket number F-91-CMLF-FFFFF).

teria impose requirements on municipal landfills that far exceed those previously imposed, including more stringent location restrictions, facility design and operating criteria, ground-water monitoring requirements, corrective action requirements, financial assurance requirements, and closure and post-closure care requirements. The Agency believes the disposal of MWC ash in municipal landfills subject to the Part 258 criteria will be protective of human health and the environment.[5]

If information comes to EPA's attention suggesting that MWC ash is being managed or disposed of in a manner that is not protective of human health and the environment under Subtitle D, the Agency will consider additional actions, including providing technical assistance, issuing guidance documents, and, if appropriate, promulgating additional regulations to address those situations. In addition, at individual sites, if the disposal of MWC ash may present an imminent and substantial endangerment to human health or the environment, EPA may require responsible persons to undertake appropriate action under section 7003(a) of RCRA, 42 U.S.C. § 6973(a).

Resource recovery from municipal solid waste is an important component of EPA's integrated waste management approach, which involves the complementary use of a variety of practices to safely and effectively manage municipal solid waste.[6] Such activity advances the statu-

[5] The promulgation of the Part 258 criteria is an important step in ensuring that MWC ash can and will be regulated in a manner that will be protective of human health and the environment under Subtitle D. The promulgation of those criteria also has served as an impetus for the Agency's reevaluation of its earlier view of section 3001(i) as not exempting MWC ash from hazardous waste regulation. 50 Fed. Reg. 28702, 28725-26 (1985).

[6] That approach establishes a hierarchy that prefers source reduction (i.e., the design, manufacture, purchase, or use of materials to reduce the amount or toxicity of solid waste generated) and recycling (i.e., the process by which materials are collected and used

tory objective of RCRA (the *Resource* Conservation and *Recovery* Act) to reduce the volume of waste that requires disposal. *See id.* at section 1002(b)(8), 42 U.S.C. § 6901(b)(8). It also advances the statutory objective of recovering significant amounts of energy from solid waste. *See id.* at sections 1002(d)(2), 42 U.S.C. § 6901(d)(2), and 1003(a)(11), 42 U.S.C. § 6902(a)(11). For those reasons, EPA agrees with Congress' view, set forth in the Senate Report discussed above, that impediments hindering the development and operation of commercially viable resource recovery facilities should be eliminated where practicable.

For nonhazardous municipal solid waste that can be disposed of either in a Subtitle D landfill or combusted in a resource recovery facility, the comparative economic desirability of those two alternatives significantly is impacted by the application of section 3001(i) to MWC ash.[7] If MWC ash is not exempt under 3001(i) from hazardous waste regulation, a strong economic incentive may exist to dispose of raw municipal solid waste in Subtitle D landfills, rather than combust that waste in resource recovery facilities. The costs associated with the disposal of MWC ash in Subtitle C facilities are dramatically higher than in Subtitle D landfills. Although costs vary significantly from region to region, when averaged on a national basis there is over a ten-fold differ-

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as raw materials for new products) over solid waste combustion (including combustion for resource recovery) and landfilling. Solid waste combustion, however, has played and will continue to play an important role in the Agency's integrated waste management approach because the entire solid waste stream cannot be reduced through source reduction and recycling. EPA encourages communities to choose the mix of solid waste options that are most appropriate for them, considering local economic, environmental, and other factors.

[7] In addition to cost, Subtitle D landfill capacity limitations also may be a significant factor in determining whether municipal solid waste is combusted in resource recovery facilities.

ence between the cost of disposal of MWC ash in a Subtitle C facility compared to a Subtitle D landfill: the cost of transporting and disposing of MWC ash in a Subtitle C facility is approximately $453.00 per ton; the cost of doing so in a Subtitle D landfill is approximately $42.00 per ton. For states that combust substantial portions of their solid waste (in resource recovery and other combustion facilities), such as Connecticut (65%), Massachusetts (47%), and Maine (45%), this cost differential could be enormous.

CONCLUSION

In sum, exempting MWC ash from hazardous waste regulation is consistent with the text and legislative history of section 3001(i), and best serves the statutory goals embodied in that provision of protecting the environment and promoting resource recovery from nonhazardous solid waste. For the foregoing reasons, EPA has determined that MWC ash is exempt from regulation as a hazardous waste under RCRA Subtitle C.

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